86-905

Supreme Court, U.S.
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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

PHILADELPHIA ELECTRIC COMPANY,
Petitioner

v.

BLACK GRIEVANCE COMMITTEE, ULYSSES MILES, ALFRED MURRAY, HENRI P. FREELAND, ROBERT PARRISH, JOANNE BOND, GEORGE WRIGHT, WILLIAM HAND, CALVIN BROWN, on behalf of themselves and all others similarly situated, WILLIE ROBINSON, WILLIE BLACKSHEAR, ALFRED L. TRAPPANESE, SR., ANDREW GAVIN and PHILIP CARANCI, Intervenor-Plaintiffs.
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

After a settlement of this company-wide, across-the-board Title VII and §1981 class action by all of the Company's black employees, the district court awarded attorneys' fees, determining a "lodestar" which it then enhanced by a 50% increase for "contingency" and decreased by only 25%, although it found plaintiffs' success was 75% less than its claim. The court of appeals, although vacating the district court's over-all fee order because of other issues not presented here, expressly affirmed and precluded the district court from reconsidering its contingency enhancer and its failure to match the lack-of-success reducer to the full percentage of lack of success. Therefore, the questions presented here are:

1. Can a "contingency" enhancer to a lodestar lawfully be based on a record which contains only rhetorical assertions of difficulty unsupported by any evidence?

2. Can a "contingency" enhancer to a lodestar lawfully be awarded in a case which is in no way exceptional?

3. When a district court finds as a fact that plaintiffs have prevailed over all on only 25% of their claim, can the court then lawfully add an additional 50%, rendering its multiplier under *Hensley v. Eckerhart* a full 75% of the lodestar?

INDEX

Questions Presented i

Table of Citations iii

Opinions Below 1

Jurisdiction 2

Relevant Statutory Provisions 2

Statement of the Case 3

Reasons for Granting the Writ 5

I. The Decision Below Affirming a Contingency Enhancer Conflicts with this Court's Decision in Blum v. Stenson 5

II. The Court of Appeals Applied the Third Circuit Standard for a Contingency Enhancer which is Presently Pending on Certiorari for Review by this Court in Pennsylvania v. Delaware Valley Citizens Council for Clean Air 7

III. The Decision Below Conflicts With the Congressional Allowance of Attorneys' Fees Only to "Prevailing Parties" as Construed by This Court in Hensley v. Eckerhart 7

Conclusion 10

Certificate of Service 11

Appendix A-1

TABLE OF CITATIONS

Cases:	Page
Blum v. Stenson, 464 U.S. 886	5, 6, 7, 8
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	6
Hensley v. Eckerhart, 461 U.S. 424	3, 4, 8, 9
Pennsylvania v. Delaware Valley Citizens Council for Clean Air, October Term 1985, No. 85-5	4, 7
United States v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973)	6
United States v. Georgia Power Co., 474 F.2d 916 (5th Cir. 1973)	6
United States v. Philadelphia Electric Company, Docket No. 72-1483 (E.D. Pa.)	6
United States v. Virginia Electric & Power Co., 372 F. Supp. 1034 (E.D. Va. 1971)	6
Statutes:	
28 U.S.C. §1254(1)	2
Section 1988 of Title 42, U.S. Code	2
42 U.S.C. §1981 and 42 U.S.C. §2000e-5(e)(3)	3
461 U.S. at 436	8
Other Authorities:	
Anderson, *Negro Employment in Public Utilities* (U. of Pa. Press 1970)	6

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Philadelphia Electric Company respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this matter on September 22, 1986.

OPINIONS BELOW

The August 13, 1985, Memorandum Opinion and Order of the United States District Court for the Eastern District of Pennsylvania, Honorable James T. Giles,

awarding certain attorneys' fees and costs to the prevailing class below is not reported and appears in the Appendix at A-1-A-24. The September 22, 1986, Opinion and Judgment of the United States Court of Appeals for the Third Circuit vacating Judge Giles's Order, but expressly affirming the two legal rulings of Judge Giles which the Philadelphia Electric Company seeks to have this Court review, are not yet officially reported and appear in the Appendix at A-24-A-44. The decision of the Court of Appeals is informally reported at 41 CCH Employment Practices Decisions ¶36, 504.

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1986, and this petition was filed within 90 days of that date. The statutory provision which confers jurisdiction on this Court to review the judgment of the Court of Appeals by Writ of Certiorari is 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2000e-5(k), of Title 42, U. S. Code, reads as follows:

> "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

Section 1988 of Title 42, U. S. Code, reads in relevant part as follows:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title . . . the court, in its discretion, may allow the

prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

This case presents important issues under the federal fee shifting statutes which have engaged the attention of this Court in recent Terms. All substantive aspects of this company-wide Title VII and §1981 class action by all of the black employees and applicants for employment at the Philadelphia Electric Company ("the Company") alleging race discrimination were settled for monetary amounts and forms of injunctive relief substantially less in every instance than those originally sought by the class. The settlement was approved by the district court after hearing, was not challenged on appeal, and has been fully carried out by the Company. Jurisdiction of the courts below was based on 42 U.S.C. §1981 and 42 U.S.C. §2000e-5(e)(3).

The parties were unable to settle the claim of the class for attorneys' fees and costs. The class's attorneys therefore filed a fee petition, supported by affidavits, which was partially opposed by the Company. Neither party sought a live hearing, and the district court on the papers entered an award of $424,535.25 in fees and $43,730.43 in costs.

As in all cases of this magnitude, the fee petition dealt with a number of discrete issues, most of which are not presented in this Petition. In particular, the district court first determined a "lodestar" amount, after excluding certain claimed hours, including others, and determining reasonable hourly rates. The court then considered the post-lodestar issues which are challenged here. First, it awarded an enhancer of 50% of the lodestar for what it characterized as the "contingent nature" of the case. Then, addressing this Court's requirement in *Hensley v. Eckerhart*, 461 U.S. 424, that the lodestar must be adjusted downward to reflect less than complete

success, the district court concluded factually that "only about 25% of the objective relief was obtained" in the settlement. Then, without further explanation, the district court in the next sentence said:

> "However, it is my belief that the value to the class of the affirmative action steps included . . . warrants an added factor of 50%." (App. A-20).

The district court thereupon increased the multiplier threefold — from 25% to 75% — with the result that the lodestar was correspondingly reduced by only 25% instead of the 75% *Hensley* lack of actual success.

The Company appealed these two legal issues and certain other issues (on some of which it prevailed in the court of appeals below). It also paid to counsel for the class fees and costs, in excess of $100,000, which were not challenged by the appeal below. The class cross-appealed.

Argument before the court of appeals below was held on June 3, 1986. Because the decision of this Court concerning the lawfulness of enhancers to a lodestar was pending at that time in *Pennsylvania v. Delaware Valley Citizens Council for Clean Air*, October Term 1985, No. 85-5, the court of appeals deferred decision to await this Court's ruling. However, on July 17, 1986, this Court decided only some of the issues pending in the *Delaware Valley Citizens* case and deferred the issue of the lawfulness of contingency enhancers to the present Term. Thereafter, the court of appeals issued its opinion and judgment on September 22, 1986.

The court of appeals reviewed each of the discrete issues raised by the appeal and cross-appeal, affirming the district court as to some issues and reversing as to others. Because some of these reversals impacted the calculation of the lodestar, the judgment of the court of appeals vacated the entire award below and remanded, with directions to recalculate the lodestar and to grant

other relief. However, the court of appeals expressly ruled:

> "The district court need not, however, reconsider its decision to reduce the lodestar by 25% because of the result-obtained factor." (App. A-43).

As to the district court's award of a 50% "contingency" enhancer, the court of appeals ruled:

> "The court's contingent risk findings are not clearly erroneous. Furthermore, the amount of the multiplier is a matter within the district court's discretion and here the court has not abused that discretion." (App. A-38).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Affirming a Contingency Enhancer Conflicts with This Court's Decision in Blum v. Stenson.

In *Blum v. Stenson*, 465 U.S. 886, this Court vacated a 50% enhancer for contingency awarded by the district court and affirmed by the court of appeals, finding no support in the record for such an award. *Id.* at 901. While the plaintiffs here, with the *Blum* decision to guide them, referred to and attempted to address the issue of "contingency," they in fact presented no facts to support their repeated affidavit rhetoric of "complexity," "contingency," "novelty," and "risk." The court of appeals summarized the plaintiffs' attempt in this area as follows:

> "They point out that (1) this case involved a large number of discrete issues, (2) allegations of company-wide racial discrimination are factually and legally difficult to prove, (3) certain legal defenses presented open questions of law, and (4) PECO was prepared to provide a strong defense." (App. A-37).

The plaintiffs and the district court in its order approving the settlement (App. A-37) also referred to the size and complexity of the action and to the existence of a 1973 Consent Decree in a case brought against the Company under Title VII by the United States, *United States v. Philadelphia Electric Company*, Docket No. 72-1483 (E.D.Pa.). In fact, these questions of size and complexity do not go to the issue of risk at all — merely to possible lengthy litigation time, all of which is compensated by the lodestar, while the pattern and practice suit by the United States demonstrates the opposite of what it is cited for by the plaintiffs, the district court and the court of appeals. Patterns of alleged discrimination in the electric utility industry were widely recognized in the period 1973-75 when this case was brought and a suit against the Company by the United States, as in the analogous antitrust area, was a signal to counsel in 1975 that the case (while undoubtedly involving a lot of facts and paper work) was very likely to be successful. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *United States v. Georgia Power Co.*, 474 F.2d 916 (5th Cir. 1973); *United States v. Virginia Electric & Power Co.*, 327 F.Supp. 1034 (E.D.Va. 1971); *United States v. Detroit Edison Co.*, 365 F.Supp. 87 (E.D. Mich. 1973) (all ruling in favor of plaintiff classes). *See also* Anderson, *Negro Employment in Public Utilities* (U. of Pa. Press 1970) (discussing *inter alia* Philadelphia Electric Company).

Thus, the record in the case below was operatively as devoid of evidence of contingency or risk as was the actually blank record in *Blum v. Stenson*. By affirming the district court's exercise of "discretion" on such a record, the court below in effect held that the holding of this Court in *Blum* can be avoided as a practical matter by the use of unsupported rhetoric in large class actions. This Court should not permit such a nullification of its holdings.

II. The Court of Appeals Applied the Third Circuit Standard for a Contingency Enhancer which is Presently Pending on Certiorari for Review by This Court in Pensylvania v. Delaware Valley Citizens Council for Clean Air.

In *Pennnsylvania v. Delaware Valley Citizens for Clean Air*, this Court granted certiorari to review a decision of the Third Circuit allowing a district court broad discretion to award an enhancer to the lodestar because of the "contingency" of the case. On July 17, 1986, this Court deferred decision on this issue and rescheduled it for reargument and decision in the present Term. Had this Court decided the issue in July of 1986, its decision, one way or the other, would have governed the decision of the panel in this case below. When this Court deferred its decision, the panel below was institutionally required to follow its own precedent, which this Court has already deemed sufficiently important to warrant review on certiorari. Were the decision below affirming a contingency enhancer to the lodestar to remain unreviewed, it could become the law of the case on the remand to the district court. Because the important issue being reviewed in *Delaware Valley Citizens* is equally present here, this Court should grant certiorari pending decision of the *Delaware Valley Citizens* case to permit a correct application of the law of contingency enhancers for the court of appeals and the District court below here and ensure uniformity in the application of this Court's rulings.

III. The Decision Below Conflicts With the Congressional Allowance of Attorneys' Fees Only to "Prevailing Parties" as Construed by This Court in Hensley v. Eckerhart.

In *Hensley v. Eckerhart*, 461 U.S. 424, this Court considered the congressional standard of "prevailing

party" in federal fee shifting statutes. This Court concluded that in determining the extent that a party prevails — and hence becomes entitled to any fee at all — "the most critical factor is the degree of success obtained." 461 U.S. at 436.

The district court below acknowledged and quoted this standard. It then undertook a detailed factual analysis of the over-all success of the class in the settlement as compared to the relief sought by the class. (App. A-18-A-20). After this review, the district court concluded:

> "Plaintiffs did not obtain through settlement the extensive monetary or injunctive relief for individuals and class members as was originally envisioned. A comparative analysis of the plaintiffs' demands and the final settlement in the Consent Decree would suggest that only about 25% of the objective relief was obtained." (App. A-20).

Under the standard established by this Court in *Hensley*, this factual analysis and conclusion by the district court required a 25% multiplier, or, equivalently, a 75% reduction in the lodestar. But the district court did not follow this requirement of *Hensley*. Without explanation, the district court went on in the very next sentence to state:

> "However, it is my belief that the value to the class of the affirmative action steps included are of immediate and long range significance and benefit to the class and warrants an added factor of 50%." (App. A-20).

In affirming this action by the district court, the court of appeals imported into the *Hensley* analysis of degree of success, which defines the degree of "prevailing" under the statute, and which alone entitles a prevailing party to any fee at all, a wholly subjective reward to counsel analogous to those disallowed in *Blum v. Stenson*. This is necessarily so because the concept of "value to the class"

as used by the district court and approved by the court of appeals can have no substantive meaning apart from the concept of degree of success. A reference to "value to the class" merely begs the basic *Hensley* question as to prevailing, namely, "value" as compared to what? Obviously the "value" of the full original claims "envisioned" by the class as analyzed by the district court in its opinion (App. A-20) would have been much, much more "valuable" to the class than the mere 25% relief over all which the district court found the class actually obtained in the settlement. In this context, reference to "value to the class" is nothing but an effort to avoid the true degree of success.[1] The district court found that the degree of success in this case was only 25% of the over-all claim.

By affirming the intrusion of an additional enhancer of 50% into the basic "*Hensley* calculation," the court of appeals both distorted the proper *Hensley* analysis of how far a party has prevailed and imported through the back door the kind of standardless, subjective reward to counsel which was rejected in *Blum v. Stenson*.

This case represents an early, major attempt to apply this Court's decision in *Hensley v. Eckerhart*. Because it so misapplies the *Hensley* standard, it must be corrected by this Court.

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1. As just one example among many, the district court found: "In the area of hiring, plaintiffs sought an order requiring hiring at a level to create a 33⅓% minority work force company-wide. This was not achieved. Rather, the Company agreed not to move for dissolution of the 1973 Consent Decree for a period of 3-5 years." (App. A-19). Patently, while the retention of the 1973 hiring rate had some "value" to the class, the 33⅓% quota sought would have had very much more "value." The same thing applies to all of the "extensive" equitable relief sought by the class which, as the district court expressly found, they "did not obtain through settlement . . ." (App. A-20).

CONCLUSION

For the foregoing reasons this Court should grant a writ of certiorari to review the two issues presented by this Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Petition for Writ of Certiorari were served by postage prepaid first-class mail on Herbert B. Newberg, Esq., counsel for the respondent, on December 2, 1986. I further certify that all parties required to be served have been served.

/s/ Robert W. Maris

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BLACK GRIEVANCE COMMITTEE, et al.

v.

PHILADELPHIA ELECTRIC COMPANY

Civil Action No. 75-3156

MEMORANDUM ENTERED: AUGUST 13, 1985

GILES, J.

On December 21, 1984, this court entered a Consent Decree which settled the parties' merit contentions in the above-captioned case. The plaintiff class, and named plaintiffs, have now petitioned for counsel fees and costs as the "prevailing party" in this litigation which has spanned more than ten years. Philadelphia Electric Company ("PECO") agrees that plaintiffs are prevailing parties and are entitled to some fee award. However, it contests the extent of the claimed lodestar of $537,499, and some of the expert witness expenses included in the costs claimed of over $20,000. Plaintiffs ask for an upward adjustment in the lodestar for delay in payment, contingency, quality of work, as well as what they perceive as exceptional success in the relief ultimately gained through the 1984 Consent Decree. PECO challenges any upward adjustment and contends that, after considering each of the possible adjustment factors, there should be a net downward adjustment.

Plaintiffs have filed a joint petition for counsel fees and costs. PECO's chief objection to the claimed lodestar hours focuses on the time spent by the lead attorneys, Herbert Newberg, Esquire and Alice Ballard, Esquire, in pursuing matters which were not, from defendant's

viewpoint, reasonably related to this employment race discrimination litigation. It challenges as excessive the maximum hourly rates asserted by lead counsel as well as the rates claimed by Earl Trent, Esquire, who had contacts with the clients but who was rarely involved directly in pleadings or other matters which involved the court. There is no substantial challenge to the lodestar claim of Phillip Fuoco, Esquire whose time involvement was small in comparison with the claims of plaintiffs' other attorneys.

This action was initiated by the Black Grievance Committee ("BGC"), a PECO employee organization whose membership is comprised principally of black persons, and seven named plaintiffs who were members of BGC. Jurisdiction over the claims of employment discrimination based upon race was first asserted under the Civil Rights Act of 1871, 42 U.S.C. §1981. Later, there was added a claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000, et seq. This litigation came on the heels of a 1973 Consent Decree issued by the Honorable Louis C. Bechtle stemming from a Justice Department race discrimination lawsuit against PECO. *United States v. Philadelphia Electric Company*, 351 F. Supp. 1394 (E.D. Pa. 1972). By reason of the 1973 Consent Decree, PECO agreed to affirmative action retention and promotion of minority applicants and employees.

The Justice Department was, and remains, responsible for monitoring compliance with that Consent Decree and is obligated to seek court intervention in the event of non-compliance. In the context of that federal agency failing to find non-compliance, this litigation was started. In many respects, the injunctive relief sought by the class duplicated that already gained through the existing 1973 Consent Decree goals and timetables to increase hiring of minorities. Nevertheless, this lawsuit sought across-the-board relief, monetary and injunctive, in all phases of employment activity. Actual damages

were sought for all members of the class, present and former employees, beginning from January 1, 1968, together with punitive damages wherever appropriate. The putative class also included all disappointed employment applicants covering the same time period.

1. CALCULATION OF THE LODESTAR

A "lodestar" is determined by multiplying a reasonable number of hours expended during the litigation times a reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, (1983).

A. MR. NEWBERG

1. Hourly Rate

Mr. Newberg claims hourly rates as follows:

9/75 to 8/78	— $135 per hour
9/78 to 8/80	— $150 per hour
9/80 to 1/81	— $175 per hour
1/82 to 12/83	— $200 per hour
1/84 to present	— $225 per hour

Apparently, PECO does not contest his hourly rates for the period through 12/81, but does contend that he should be limited to an hourly rate of $175 thereafter, citing District Judge Huyett's conclusion in 1982 as to Mr. Newberg's hourly rate in another Title VII case, *Kuhn v. Philadelphia Electric Company*, C.A. No. 77-1107, Fee Order, January 20, 1982, and a civil rights action, *Institutionalized Juveniles v. Secretary of Public Welfare*, 568 F. Supp. 1020, 1034 (E.D. Pa. 1983). Mr. Newberg has produced billings from some other non-contingent fee matters to evidence that he has charged some clients the rates claimed. However, there is no showing that these rates were, in fact, collected or that the maximum hourly rate charged there would be appropriate for the kind of work done in this case.

I accept the findings of Judge Huyett in *Kuhn* and *Institutionalized Juveniles* as to Mr. Newberg's maximum hourly rate of $175 as of 1983. It would appear from the billing history thereafter in non-contingent fee matters that Mr. Newberg has attempted to realize an increase in his hourly rate on a yearly basis. It would also appear that the maximum level of skill and expertise is not required to perform all the services that a client might require in the representation. It cannot be said on this record that all the rates that have been asserted by Mr. Newberg are prevailing market rates. Further, Mr. Newberg had the assistance of three other co-counsel, and particularly, another lead counsel in performing the various legal tasks associated with this case. This fact runs counter to a claim of an advanced hourly rate which presumptively represents the ability to perform all legal facets of the representation independently.

Considering all of the above factors, I find that for the period January 1982 through December 1983, an hourly rate of $175 is appropriate and reasonable and for the period of January 1984 to the present an hourly rate of $190 is fair and reasonable. This is especially so, inasmuch as these rates will apply to all aspects of the work done by Mr. Newberg, including that which was routine and which arguably should not have been billed at a maximum hourly rate. Therefore, the hourly rates for Mr. Newberg's non-fee petition work will be reflected as follows:

9/75 to 8/78	— $135 per hour
9/78 to 8/80	— $150 per hour
9/80 to 12/81	— $175 per hour
1/82 to 12/83	— $175 per hour
1/84 to present	— $190 per hour

2. *Hours*

It has been agreed between the parties that Mr. Newberg's original claim of hours total 1351.9, inclusive

of 3.8 hours for fee petition work. My calculations, however, show a total of 1326.4 hours. From these hours, PECO claims deductions should be made for inadequately described legal work, work on unrelated Title VII and NLRB litigation and injunctive relief improvidently sought before this court.

(a) Inadequately Described Work

PECO seeks to exclude 115.5 hours for the period 1975 through approximately 1980 as being inadequately described by Mr. Newberg. Counsel for plaintiffs bear the burden of describing adequately the nature of the work performed. *Richerson v. Jones*, 506 F. Supp. 1259, 1264 (E.D Pa. 1981). I have reviewed the entries for the period in question. There are many entries which certainly could be more definite. However, I am satisfied, given what is now known about the work by counsel, that the hours charged, which PECO challenges as inadequately described, are related to this multi-faceted case. Consequently, because I have no concern that improper hours are claimed, I find that these hours should be included in the lodestar.

(b) Chemical Spill

In March 1979, Mr. Newberg spent 8 hours in an unsuccessful attempt to have this court enjoin the directives of Henkel & McCoy, the employer of two contingent construction workforce employees, not to return to the PECO premises to work. For what were given as safety reasons, they had refused an order of a PECO supervisor to clean up a chemical powder spill. PECO had requested that their employer not sent them back there to work. Neither man was a member of the class nor a named plaintiff. Mr. Newberg contends that he believed that the incident represented a prime example of retaliation and harrassment against contingent workers, in general, who were seeking to enforce their civil rights. The petition for a temporary restraining order was denied. The incident was a labor relations problem that did not pertain to the merits of the issues before the court.

They were not prevailing parties on this score. Accordingly, these 8 hours will be disallowed.

(c) Collectors

During the course of the litigation, plaintiffs sought a temporary restraining order on behalf of a group of collectors, employees who visit the homes of deliquent customers to collect amounts due. The collectors are authorized to cut the power lines if payment is not forthcoming. PECO had had a policy of sending out collectors in teams of two. Allegedly, after the collector workforce became predominatly black, the policy was changed such that on occasion a single collector could be sent out on the job. The plaintiffs considered this new policy to create a dangerous condition for the collectors, particularly since customers faced with a cessation of service could become hostile and threaten the collectors physically. Plaintiffs' counsel assert that their work on this aspect of the case provided them with a cameo example of PECO assigning harsher working conditions in areas where black employees were concentrated. The petition for a temporary restraining order was denied. Any grievances were resolved through PECO's personnel channels. Plaintiffs failed, therefore, to show that race was the motivation for the change in policy or that there was a need for injunctive relief. The policy under attack potentially affected white collectors and black collectors alike. Plaintiffs were not "prevailing parties" in this supplemental action. It did not later appear through any pretrial memorandum to have been a factual basis for the relief ultimately sought in the case. Accordingly, I find that the time devoted to this activity must be deducted from the claimed lodestar. The 26 hours spent by Mr. Newberg on this matter are disallowed.

(d) Final Pretrial Memorandum

PECO also seeks reduction of the claimed lodestar by the number of hours Newberg and Ballard expended on a pretrial memorandum in January 1981. This memorandum proved to be inadequate and prompted the

need for a new submission. Plaintiffs' lead counsel each spent 16 hours on its preparation, including attendance at a pretrial conference. Nevertheless, the memorandum lacked the specificity necessary to advise this court or the defendant, in a reasonable fashion, of the plaintiffs' theories. It also failed to indicate which witnesses and documents would be used in the attempt to prove these theories. However, plaintiffs contend that this submission provided the basis for the second memorandum and, therefore, was not wasted. The time spent by counsel on the first memorandum was not reasonably related to the progress of the case. The work duplicated the subsequent better directed efforts of counsel. The submission of an unsuitable final pretrial memorandum from plaintiffs at that point in time delayed the case, prompted a motion from PECO to dismiss the suit and an order of the court requiring another final pretrial memorandum. Accordingly, the 16 hours claimed by Mr. Newberg for his efforts on the first final pretrial memorandum will be disallowed.

(e) The NLRB Proceedings

The more substantial dispute concerns time charges related to plaintiffs' counsels' claims for time spent assisting the Philadelphia Regional Office of the National Labor Relations Board ("NLRB") in the investigation and prosecution of unfair labor practice charges of the Black Grievance Committee ("BGC"). The BGC contended that the organization itself and its individual members, some of whom were white, had been discriminated against by the company. It contended the company's favored treatment of the Independent Group Association ("IGA") and concomitant refusal to recognize the BGC as an authorized representative of particular employees with individual grievances against PECO resulted in their suffering discriminatory treatment. Allegedly, the IGA was accorded this recognition. Through the NLRB process, plaintiffs' counsel contend that they hoped to gain the same recognition for the BGC and

thereby bring pressure on PECO to cease and desist the alleged discriminatory treatment of black workers and other members of the BGC.

Neither the BGC nor the IGA had been certified as the exclusive collective bargaining agent as a result of an NLRB conducted election or through an equivalent informal process. Relying on existing precedent, an administrative law judge ("ALJ") ruled in favor of PECO on the complaint filed by the NLRB Regional Office. The ALJ held that no violation of §8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §158(a)(1) (1982) occurs where an employer chooses to show partiality to one employee organization over another for purposes of dealing with terms and conditions of employment when neither organization purports to represent a majority of the employees in the workplace nor seeks status as the exclusive bargaining agent under §9(a) of the NLRA. A three member panel of the NLRB adopted the ALJ's findings and holding without opinion. 268 N.L.R.B. NO. 123 (1984). The NLRB complaint averred that the failure to accord the same status to the BGC as was given to the IGA was motivated by race. Race discrimination is not a per se violation of the NLRA. There was no determination whether there was a nexus between any alleged violation of employee rights protected under the NLRA and alleged race discrimination. The settlement of this case occurred before the Third Circuit reversed and remanded in *Black Grievance Committee v. NLRB*, 749 F.2d 1072 (3d Cir. 1984). Although the NLRB proceeding was very much a part of the settlement discussions, as is evidenced by the proposed settlement agreement, it did not become part of the Consent Decree.

Plaintiffs attempt to justify the time spent on the NLRB matter as instrumental to the discovery process in their Title VII and §1981 cases before this court and as essential leverage for effectuating settlement of the instant case. I disagree. Any discovery of factual issues or

legal principal witnesses in the NLRB matter would have had to have been duplicated in this case. The thrust of the NLRB proceeding was not whether there was race discrimination but rather whether there was a violation of organizational rights of employees protected under the NLRA. The Regional Attorney of the NLRB was in charge of prosecuting the theories of the complaint, not plaintiff's attorneys. An ALJ, and not this court, was in charge of deciding the relevancy of proferred evidence. Indeed, any determination of racial nexus in the NLRA context would have been of no controlling consequence or evidentiary value in the trial of the various race issues before this court. The NLRA proceeding was a separate proceeding from the one before this court. As important as counsel's NLRA work must have been to the BGC enhance its stature with PECO and its employees, it is not possible to give plaintiffs' counsel credit for work that was not done in this case and which would have had to have been duplicated here had the case not settled. Moreover, this court is not in a position to judge whether plaintiffs' counsels' efforts in the NLRA proceedings were wasteful, knowledgeably pursued or duplicative of the efforts and expertise of the NLRB attorneys who were responsible under law to investigate, evaluate and press the complaint on behalf of PECO employees and the BGC. While counsel have an expertise in Title VII and §1981 race discrimination matters, they do not hold themselves out as experts in the area of NLRA matters. For these reasons, the work by plaintiffs' counsel on the NLRA matter is not compensable in this case.

Finally, the Third Circuit's reversal did not establish a nexus between any violation of §7 of the NLRA and alleged race discrimination. *Black Grievance Committee, supra* at 1077 n.4. Thus, under Title VII, plaintiffs were not "prevailing parties." Mr. Newberg spent 86.7 hours on this work. Ms. Ballard spent 268.9 hours on the matter. These hours will be subtracted from the lodestar.

(f) Newberg Associates

The work of the associates of Mr. Newberg will be compensated at $50.00 per hour which was the billing rate at the time their services were rendered. The hours number 169.5. Therefore, the lodestar for this work is $8,475.00 (169.5 x $50) and will be included in Mr. Newberg's portion of the lodestar.

(g) Paralegal and Law Student Time

The plaintiffs have sought to include the time spent by paralegals and law students in the lodestar. This request is denied. Paralegals and law students work according to the directives of counsel. The assistance they provide allows counsel to spend their hours more productively on those aspects of the case requiring their skill and expertise. Consequently, counsels' hourly rate reflects the value of making that non-lawyer time productive. Although there is precedent supporting plaintiff's counsels' position, this court prefers to follow *Bogosian v. Gulf Oil Corporation*, Nos. 71-1137, 71-2543, slip op. at 7 (E.D. Pa. April 1, 1985) where the court rejected including in the lodestar, the hours of paralegals and law students. Accordingly, that time will be treated as one of the costs incurred by plaintiffs, and excluded from the lodestar.

(h) Fee Petition Work

Plaintiffs' counsels' time spent preparing the fee petition will be compensated outside of the lodestar. The parties dispute whether this time should be calculated at the maximum hourly rate for the lawyer involved or at the minimum rate for any associate of the law office. PECO argues for $60 an hour. This court recognizes that work done on a fee petition does not require great legal skill. *Richerson v. Jones*, 506 F. Supp. 1259, 1265 (E.D. Pa. 1981), *citing Fernandez v. Shapp*, No. 74-2959, slip op. at 9 (E.D. Pa. May 29, 1980). In this case, I find that the preparation of this fee petition warrants compensation at the hourly rates reflecting an attorney's mechanical application of established principles of law as

opposed to rates which reflect some professed expertise in specialized litigation. I find that the appropriate rate is $75 per hour. The hours spent by Mr. Newberg on a motion for interim fees will be disallowed altogether. That motion was denied and this court finds that the time spent by Mr. Newberg on it was unnecessary.

(i) Kuhn Litigation

Mr. Newberg has erroneously charged in this case 11.5 hours for time spent on the matter of *Kuhn v. Philadelphia Electric Company*. That time will be deducted.

(j) Summary of Deductions of Hours from Mr. Newberg's Lodestar

(8/78-8/80)	Chemical Spill	— 8 hours
(8/78-8/80)	Collectors	— 26 hours
(8/78-8/80)	Kuhn Litigation	— 11.5 hours
(9/80-12/81)	Final Pretrial Memo	— 16 hours
(1/82-12/83)	NLRB Proceedings	— 86.7 hours
(1/84-present)	Fee Petition	— 3.8 hours

In addition, the charges for fee petition preparation and briefing and the paralegal and law student time will not be included in the lodestar.

(k) Summary of Newberg Lodestar

Billing Period	Hours Claimed	Hours Deducted	Hours Allowed		Rate		
(4/75-8/78)	496.5	0	496.5	x	135	=	67,027.50
(8/78-8/80)	340.25	45.5	294.75	x	150	=	44,212.50
(9/80-12/81)	138.75	16	122.75	x	175	=	21,481.25
(1/82-12/83)	301.5	86.7	214.8	x	175	=	37,590.00
(1/84-Present)	49.4	3.8	46.6	x	190	=	8,664.00
							178,975.25
Newberg Associates	169.5	0	169.5	x	50		8,475.00
	NEWBERG LODESTAR TOTAL:						$187,450.25

B. MS. BALLARD

1. Hourly Rate

Ms. Ballard claims an hourly rate of $150 per hour for all work. PECO answer that the reasonable rate should be $90 per hour. In 1982 in *Kuhn v. Philadelphia*

Electric Company, a clas action sex discrimination against defendant, Judge Huyett determined that Ms. Ballard's hourly rate for lodestar purposes was $90. I adopt that decision as the best historical evidence of her market rate through 1982. Currently, she claims an hourly billing rate of $150. However, there is insufficient evidence that she bills all non-contingent fee hours *and* is paid consistently at that rate for all hours billed. Considering that her determined market rate was $90 in 1982, the inquiry becomes what is a fair and reasonable expectation for hourly rates in each of the succeeding years. I find that the reasonable rate for 1983 was $100 per hour; for 1984 it was $115 per hour, and for 1985 it was $125 per hour. These rates represent an increase in the skill, expertise and responsibility of counsel in the trial of employment discrimination cases which was brought to bear in concluding the litigation.

2. *Hours*

Ms. Ballard claims in the petition, by my calculations, a total of 1029.1 hours:

Year		Hours
1979	—	67.1
1980	—	152
1981	—	237.6
1982	—	261.8
1983	—	216.8
1984	—	63.2
1985	—	30.6

Included in these hours are 9 hours for fee petition preparation done in 1985; 268.9 hours (10.6 hours in 1980, 22.2 hours in 1981, 218.2 hours in 1982, 15.9 hours in 1983 and 2 hours in 1984) devoted to NLRB matters; 16.8 hours (.4 hours in 1980 and 16.4 hours in 1981) towards the final pretrial memorandum; 35.4 hours towards Collectors' Temporary Restraining Order (.7 hours in 1979 and 34.7 hours in 1980) and 9.5 hours (3.7 hours in 1979, 5.5 hours in 1980 and .3 hours in 1981) devoted to interviews of black female employees in the

Kuhn v. Philadelphia Electric Company case. These hours will be deducted from the lodestar. Except for the hours related to the fee petition preparation, the time deducted will be disallowed for the same reasons they were disallowed in the instance of Mr. Newberg. In addition, respecting the *Kuhn* hours, presumably this time has already been compensated by Judge Huyett in his fee award. Counsel does not show the contrary to be true. Even though the *Kuhn* female plaintiffs may have also discussed black employee concerns, the time expended connot be doubly compensated by an additional award in this case.

Therefore, Ms. Ballard's compensable hours are as follows:

Year	Hours Claimed	Hours Deducted	Hours Allowed		Rate		
1979	67.1	4.4	62.7	x	90	=	$ 5,643.00
1980	152.0	51.2	100.8	x	90	=	9,072.00
1981	237.6	38.9	198.7	x	90	=	17,883.00
1982	261.8	218.2	43.6	x	90	=	3,924.00
1983	216.8	15.9	200.9	x	100	=	20,090.00
1984	63.2	2	61.2	x	115	=	7,038.00
1985	30.6	9	21.6	x	125	=	2,700.00
	BALLARD'S LODESTAR TOTAL					=	$66,350.00

C. MR. FUOCO

Mr. Fuoco's claimed hourly rates are not challenged by PECO. However, I do not find the asserted 1985 rate of $135 per hour justified or proven, particularly considering the allowed rate for Ms. Ballard's work. Moreover, the two hours charged in 1985 pertain to time he spent preparing the fee petition. Therefore, the two hours charged in 1985 will be compensated at the rate of $75 per hour, the rate found reasonable by this court for time spent on fee petition preparation. Since his work in 1985 pertains to preparation of the fee petition, it will be excluded for purposes of lodestar computation. His lodestar

is computed as follows:

1975	12.75 hours	at $65	=	$ 828.75
1976	93.5 hours	at $75	=	7,012.50
1977	46.5 hours	at $75	=	3,487.50
1978	9.5 hours	at $85	=	807.50
	FUOCO LODESTAR TOTAL		=	$12,136.25

D. MR. TRENT

Mr. Trent claims an hourly rate of $100 per hour for the period 1979-80; $115 per hour 1981-82; and $125 per hour 1983-84. His involvement in the case and, therefore, his demonstration of expertise in the litigation of Title VII cases was not as extensive as that of Ms. Ballard. He has not proven that his billings and receipts for hours worked in non-contingent fee matters during these periods averaged the claimed rates. I find that a fair and reasonable hourly rate for him is $90 per hour for all work.

Total Hours x Hourly Rate = 185.50 x $90

TRENT LODESTAR TOTAL = $16,695.00

E. TOTAL LODESTAR

Newberg	$187,450.25
Ballard	66,350.00
Fuoco	12,136.25
Trent	16,695.00
	$282,631.50
Newberg letter 3/6/85 (1.8 x $190)	342.00
Ballard letter 4/25/85 (.04 x $125)	50.00
	$283,023.50

II. ADJUSTMENTS TO THE LODESTAR

A. DELAY IN PAYMENT

The lodestar having been determined, the next step will be to ascertain whether it should be adjusted upward

for delay in payment. PECO concedes that it should, but argues for an adjustment not to exceed 25%. Plaintiffs argue for application of a "prevailing interest rate" concept. I reject the plaintiffs' contention. No counsel fees became potentially payable until the Consent Decree was approved at which point plaintiffs could be deemed the prevailing party. Indeed, no fees become payable until this court rules on the fee petition. A reasonable upward adjustment is appropriate for the delay in payment. Twenty-five percent is reasonable.

B. CONTINGENCY

PECO contends that the contingency value of the case was such that an upward adjustment of plaintiffs' lodestar is not appropriate. I disagree. Even though there was a resolution of certain discrimination claims through the Consent Decree in *United States v. Philadelphia Electric Co., supra,* there continued to be many complaints by black employees at PECO about adverse employment practices based on race. The volume of individual complaints suggested the existence of continuing systemic discrimination in areas addressed, and not addressed, by the 1973 Consent Decree. The search for the source of those complaints through the adversary process, especially in the face of the aforementioned Consent Decree, and the fact that the United States had sought no enforcement action for non-compliance makes this an appropriate case in which to make an upward adjustment based on the contingency factor. There was also considerable risk that the source of the complaints was not systemic race discrimination but a series of individual grievances stemming from employee (including plaintiffs or class members) misconduct, attitudes of fellow workers generated by community biases as opposed to company instilled or tolerated prejudices, or changes in economic circumstances. There was also a risk of discovering mid-stream that the power struggle

for labor relations recognition by a predominantly black employee organization was a matter within the exclusive province of the NLRA and not a Title VII or § 1981 matter at all. These were some of the risks which existed at the time the case was commenced which could have dissuaded counsel from undertaking the representation. The plaintiffs have not prevailed in the sense of proving that there was discrimination. Nonetheless, they have prevailed in obtaining some affirmative action helpful to the class that was not initiated by the company on its own and which may not have been achieved but for the prosecution of this lawsuit. Balancing the risks undertaken in the context of what was not proven and the scope of the relief which was obtained, I find tht an upward adjustment of .50 for the contingency factor is appropriate.

C. QUALITY OF WORK

Predictably, plaintiffs urge an upward adjustment of the lodestar while defendant urges a downward adjustment based on the quality of the plaintiffs' counsels' work during the course of this litigation. Due to the complexity of the necessary proof, generated in large part by the ambitious structuring of the across-the-board claims, I find that no downward adjustment is warranted for quality. Nor do I find that an upward adjustment is appropriate.

Plaintiffs sought the broadest possible relief and the broadest possible class in their efforts to remedy what they perceived to be "patterns and practices" of discrimination. This was so, despite a 1973 Consent Decree in *United States v. Philadelphia Electric Co., supra,* in which the defendant pledged to set and fulfill certain hiring and promotional goals for minorities in various categories of employment. While the efforts by plaintiffs' counsel were laudable, and certainly well-intentioned, there was much wasted time and energy. For example,

the NLRB involvement detracted from discovery that should have been pursued and developed in this case on the issue of race discrimination. That ancillary proceeding became overwhelmingly concerned with the unfair labor practice charges of a white employee who was not a member of the class. Considerable effort was made to expand the class to include all white employees in the contingent work force when, in fact, those persons had interests different from, and adverse to, the black employees in the group. In fact, these white employees hired another attorney, Santo Federico, Esquire, to make known their objections to the settlement proposal. These objections demonstrate that despite the great expenditure of time in consulting with the employees, plaintiffs' counsel did not adequately determine the interests of this segment of the proposed subclass of all contingent workers.

Plaintiffs' counsels' performance in this case, in terms of complying with court schedules for completion of discovery and pretrial memorandum and, generally, readying this case for trial disposition, was not so superior as to warrant a quality adjustment above their hourly rates, as determined here, which reflect expected expertise. The case was pursued through a period when the controlling case law was in flux. Some theories of liability fell by the wayside because of decisions by appellate courts, including the Supreme Court of the United States. In all of this, counsel were looking for a key to discovery of systemic discrimination as opposed to individual discrimination. Test validation was represented as one such key. However, plaintiffs did not depose PECO's testing or statistical experts. As of the time of trial, neither plaintiffs' theories nor evidence on that score had been fully developed. Moreover, data discovered during the pending litigation showed that the statistical analysis on which plaintiffs may have been content to rest at one time was invalid.

Plaintiffs assert that because there was a settlement of value hammered out on the eve of trial, ten years after the complaint was filed, there should be an upward adjustment of the lodestar. While it is true that many months of trial were avoided by the settlement, that fact does not weigh on the side of quality work adjustment. The Consent Decree does not establish the existence of illegal discriminatory conduct, systemic or individual. A trial may have resulted in a verdict for PECO. The settlement avoided for the class and individual plaintiffs the risk of losing and of obtaining no additional affirmative action commitments from the company. The settlement terms, though of significance for the employees, generally, were not tantamount to a "win" given the contentions in the complaint. Accordingly, plaintiffs' request for an upward adjustment is denied.

D. HENSLEY ANALYSIS

In *Hensley v. Eckerhart*, 461 U.S. 424, (1983), the Supreme Court held that under the Civil Rights Attorney's Fee Award Act, 42 U.S.C. § 1988, the district court must consider, among other factors, the relationship between the extent of success and the amount of the attorney fee award. The Court stated that where "a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. . . . [T]he most critical factor is the degree of success obtained." *Id.* at 436. In this case, brought under § 1981 as well as Title VII, the Civil Rights Attorney's Fee Award Act is applicable.

A *Hensley* analysis is appropriate to assess plaintiffs' degree of success. Plaintiffs suggest that *Hensley* is inapposite because plaintiffs obtained the results sought. This position fails to acknowledge the numerous objections made to the proposed settlement by members of the

class who complained that the relief sought by the lawsuit was not being provided. In the area of hiring, plaintiffs sought an order requiring hiring at a level to create a 33⅓% minority workforce company-wide. This was not achieved. Rather, the company agreed not to move for dissolution of the 1973 Consent Decree for a period of 3-5 years. In the areas of qualifications and testing, which were contended to be clearly discriminatory, plaintiffs failed to adduce evidence sufficient to make out a prima facie case of illegality. The Consent Decree provides for training classes for minorities interested in taking aptitude and trade qualifying tests. In the area of promotions, transfers, management selection and performance evaluations, plaintiffs had charged that the criteria being utilized by PECO were discriminatory. The plaintiffs obtained an agreement from PECO to establish a career counseling function to review career paths open to any employee and to encourage qualified employees to pursue their individual goals. Moreover, PECO agreed to develop a sensitivity training program for supervisors focusing on the problems, concerns and potentials of minority employees in the Management Training Program.

The contingent construction work force claim principally resulted in an acceleration of PECO's existing commitment to persons listed for relief in the 1973 Consent Decree and a settlement fund of $60,000 for 10 named individuals and $60,000 for the remaining contingent workers. Plaintiffs had sought individual monetary awards for 54 named workers which they ultimately failed to obtain. They had also sought an order requiring PECO to rehire the entire group of workers, who are presently on the payroll of an independent contractor, and to give all such persons full back-pay, benefits and seniority rights as though they had continued in the employ of PECO. Plaintiffs settled for no equitable relief in this area beyond that which already existed in the 1973 Consent Decree.

With respect to the general back pay claim of the class, monetary relief had been sought reaching back to January 1, 1968. Front pay and punitive damages were sought as well. The class consisted of many hundreds of past and present employees as well as a group of alleged applicant discriminatees. The potential monetary claim, then, was many millions of dollars. The Consent Decree reflects an agreement that PECO create a total fund of $500,000 which included the $120,000 already discussed which was set aside for named individuals and the contingent work force and $300,000 for minorities employed at the company from 1969-83. Eighty-Thousand dollars was to be distributed to the class members in the Electric T&D department.

Through the Consent Decree the plaintiff class did gain a voice in addressing employee grievances and disputes. PECO agreed to create a nine-member Affirmative Action Committee chaired by the Manager of Personnel and Industrial Relations. The class was given one seat on the Committee. Although the formation of this Committee had not specifically been sought, it was an innovative step towards a monitoring alternative to close court supervision of the Consent Decree. Further, the Committee concept has an advantage of redressing grievances and resolving employee concerns before they might escalate into formal discrimination charges and lawsuits.

Plaintiffs did not obtain through settlement the extensive monetary or injunctive relief for individuals and class members as was originally envisioned. A comparative analysis of the plaintiffs' demands and the final settlement in the Consent Decree would suggest that only about 25% of the objective relief was obtained. However, it is my belief that the value to the class of the affirmative action steps included are of immediate and long-range significance and benefit to the class and warrants an added factor of 50%. Accordingly, under a *Hensley* analysis, plaintiffs successfully achieved only 75% of the

relief sought. Therefore, plaintiffs' lodestar shall be adjusted downward by 25%.

Net Adjustments to Lodestar

Delay in Payment	+ .25
Contingency	+ .25
Quality of Work	.00
Time & Expense Saved	.00
Furthering the Civil Rights Law	.00
Hensley Analysis	− .25
NET	+ .50

Adjusted Lodestar Fee Award

$283,023.50 increased by .50 = $424,534.25

I will not allocate the fee award between the attorneys because the disallowed time devoted by any one lawyer may cause a disproportionate allocation. For example, Ms. Ballard spent over 260 hours on NLRB work which was disallowed. Since the attorneys made a joint decision as to allocation of work, I will leave it to them in the first instance to make an allocation of the fee.

Costs

Attorneys Newberg and Ballard claim expert witness expenses relating to Drs. Brent Baxter and James Kirkpatrick, who reviewed test validation studies previously conducted by PECO, and Regan R. Rockhill, a certified public accountant, who testified at the settlement approval hearing on the costs to PECO of implementation of the proposed consent decree. I find that these expenses were reasonably related to the prosecution of the merits and the settlement of the case.

The costs of travel, postage, overtime typists, and telephone usage, will be excluded as expenses included in overhead contemplated by the hourly rates awarded and as other than extraordinary costs. *Vecchione v. Wohlgemuth,* 481 F. Supp. 776, 798-800 (E.D. Pa.

1979). The costs of photocopying, programming and computer use will be allowed as reasonably necessary to the test validation review by plaintiffs and their experts. The costs of deposition transcripts will be allowed, except for the transcript of attorney Robert Orcutt, who was a collector.

Accordingly, for Ms. Ballard the total allowable costs are

Paralegals	$18,328.00
Law Students	5,750.00
Expert Witnesses	5,716.71
Programmer	500.00
Computer Facility	1,507.42
Photocopying	173.30
Deposition Transcripts	756.00
	$32,731.43

For Mr. Newberg the total allowable costs are

Expert Witnesses	$ 7,497.59
Computer	500.00
Deposition Transcripts & Tapes	649.34
Court Reporter	723.60
Notary	2.50
Photocopying	1,625.97
	$10,999.00

Fee Petition Preparation

I have found that the appropriate hourly rate is $75.00 for time spent preparing the fee petition and that the time expended on fee petition preparation was reasonable. However, the time expended on the motion for interim fees has been disallowed as unreasonable.

Mr. Newberg

Original Petition	45.1	x	75	3,382.50
Reply Brief re Fees	25.1	x	75	1,882.50
Letter 3/6/85	1.5	x	75	112.50
				$5,377.50

Ms. Ballard

Original Petition	23.2	x	75	1,740.00
Reply Brief re Fees	3.3	x	75	247.50
Letter 4/25/85	2.1	x	75	157.50
				$2,145.00

Mr. Fuoco

Original Petition	2	x	75	150.00
			TOTAL	$7,672.50

Joint Attorneys Fee	$424,535.25
Ballard's Costs	32,731.43
Newberg's Costs	10,999.00
Ballard's Fee Petition Preparation	2,145.00
Newberg's Fee Petition Preparation	5,377.50
Fuoco's Fee Petition Preparation	150.00
	$475,938.18

Accordingly, PECO shall pay to plaintiffs' counsel a joint attorneys' fee of $424,535.25 together with costs of $32,731.43 and a fee petition preparation award of $2,145.00 payable to Ms. Ballard, costs of $10,999.00 and a fee petition preparation award of $5,377.50 payable to Mr. Newberg and a fee petition preparation award of $150.00 payable to Mr. Fuoco.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BLACK GRIEVANCE COMMITTEE, et al.

v.

PHILADELPHIA ELECTRIC COMPANY

CIVIL ACTION NO. 75-3156

ORDER

AND NOW, this 13th day of August, 1985, for the reasons stated in the accompanying memorandum, it is hereby ORDERED that defendant shall pay to plaintiffs' counsel a joint attorneys' fee of $424,535.25 together with costs of $32,731.43 and fee petition preparation award of $2,145.00 payable to Ms. Ballard, costs of $10,999.00 and a fee petition preparation award of $5,377.50 payable to Mr. Newberg and a fee petition preparation award of $150.00 payable to Mr. Fuoco.

BY THE COURT:

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1561 and 85-1562

BLACK GRIEVANCE COMMITTEE — ULYSSES MILES, ALFRED MURRAY, HENRI P. FREELAND, ROBERT PARRISH, JOANNE BOND, GEORGE WRIGHT, WILLIAM HAND, CALVIN BROWN, on behalf of themselves and all others similarly situated and WILLIE ROBINSON, WILLIE BLACKSHEAR, ALFRED L. TRAPPANESE, SR., ANDREW GAVIN, and PHILIP CARANCI,

Intervenor-Plaintiffs

v.

PHILADELPHIA ELECTRIC COMPANY,

Appellant in 85-1561
Cross-Appellee in 85-1562

(D.C. Civil No. 75-3156)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued: June 3, 1986
Before: GIBBONS, BECKER, and STAPLETON,
Circuit Judges

(Opinion Filed: September 22, 1986)

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OPINION OF THE COURT

GIBBONS, *CIRCUIT JUDGE*:

This appeal involves a dispute over attorneys' fees that arose after an employment discrimination class

action was settled. The settlement did not deal with the attorneys' fees issue, and following a hearing on the plaintiffs' fee petition the district court ordered the defendant to pay $475,938.18 in attorneys' fees and costs. Defendant appealed and plaintiffs cross-appealed. We will vacate the fees and costs awards and remand for further consideration.

I.

The underlying action asserted claims under section 16 of the Civil Rights Act of 1870 (codified as amended at 42 U.S.C. § 1981 (1982)), and was originally filed by the Black Grievance Committee (BGC) and seven individual employees in November of 1975. In 1976 the complaint was amended to add claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982). Subsequently, in 1978, a company-wide class of employees was certified, and after various pretrial conferences and extended periods of discovery, trial was finally set for July of 1983. BGC's basic theory for its claims was that the defendant, Philadelphia Electric Company (PECO) had engaged in company-wide racial discrimination in hiring, assigning, testing, promoting, and terminating black employees. Just prior to the commencement of trial, however, the parties agreed to settle the suit. Notice of settlement was given to the class and, after the court approved the settlement in the form of a consent decree, the decree was signed on January 3, 1985.

The consent decree reserved the issue of reasonable attorneys' fees and, after BGC and PECO were unable to settle the fee issue, BGC filed a fee petition. This petition sought a lodestar of $537,499.00, increased by a multiplier of 2.75 to 3.0 and costs totaling $20,024.07. PECO responded by conceding that BGC was the "prevailing party," but it challenged certain hours and the hourly fees used to

calculate the lodestar. On August 13, 1985 the district court ordered PECO to pay plaintiffs' counsel attorneys' fees of $424,535.25. This award consisted of a lodestar of $283,023.50 adjusted by a 25% delay enhancer, a 50% contingency enhancer, and a 25% result-obtained reducer. The district court also awarded plaintiffs' attorneys $7,672.50 for the time spent in preparing the fee petition and $43,730.43 in costs.

II.

The Civil Rights Attorneys' Fees Awards Act of 1976 and the attorney's fee provision contained in Title VII of the Civil Rights Act of 1964 provide that in federal civil rights actions "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1982); 42 U.S.C. § 2000e-5(k) (1982).[1] A reasonable attorneys' fee is "one that is 'adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys.'" *Blum v. Stenson*, 465 U.S. 886, 897 (1984) (quoting S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5907, 5913). The basic fee, therefore, is usually "calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum*, 465 U.S. at 888; *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Because each litigation involves unique factors, however, the basic fee (known as the lodestar) may be adjusted upward or downward based on such factors as the result obtained. *See Hensley*, 461 U.S. at 434; *see also City of Riverside v. Rivera*, 106 S. Ct. 2686, 2691 (1986) (plurality opinion).

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1. The standards applicable to determining what constitutes reasonable attorneys' fees are the same under both § 1988 and Title VII. *See* Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983).

While both the Supreme Court and this court have pointed to various factors and attempted to explain how a fee should be calculated, the determination is primarily a matter committed to the discretion of the district court. *See Blum*, 465 U.S. at 896-97; *Hensley*, 461 U.S. at 436-37; *Institutionalized Juveniles v. Secretary of Public Welfare*, 758 F.2d 897, 919, 921-22 (3d Cir. 1985). As this court has explained,

> an award of reasonable attorneys' fees is within the district court's discretion. . . . Thus our standard of review is a narrow one. We can find an abuse of discretion if no reasonable [person] would adopt the district court's view. . . . We may also find an abuse of discretion when the trial court uses improper standards or procedures in determining fees, or if it does not properly identify the criteria used for such determination. Factual findings, of course, are subject to the clearly erroneous standard of review.

Silberman v. Bogle, 683 F.2d 62, 64-65 (3d Cir. 1982) (citations omitted).

III.

Between them PEOC and BGC raise ten challenges to the district court's attorneys' fees and cost awards. Two challenges raised by BGC relate to the calculation of the lodestar, an additional challenge by BGC plus four challenges raised by PECO relate to the adjustments that were made to the lodestar, while the remaining three challenges (one raised by BGC and two raised by PECO) concern the award for costs and the award for the expense incurred in preparing the fee petition. Because various calculations affect other calculations we will first review the challenges to the

lodestar calculation, we will then consider the challenges to the adjustment of the lodestar, and finally we will review the costs and fee petition awards.

1. *The Billing Rate for BGC's Attorney*

In their cross-appeal, the attorneys for BGC challenge the district court's reduction of some of their hourly rates. Attorneys Herbert Newberg, Alice Ballard, and Earl Trent each set forth their historic hourly rate in affidavits attached to the fee petition.[2] PECO did not challenge, and the district court did not reduce, Newberg's rate for the period from September of 1975 to December of 1981 or Ballard's rate for the period from January of 1979 to October of 1980. However, for the period thereafter PECO asserted that Newberg's rate should have been limited to $175 per hour and that Ballard's rate should have been limited to $90 per hour. In addition PECO contended that the market rate for an attorney of Trent's experience was at best $90 per hour.

PECO based its contention concerning the reduction in the rates for Newberg and Ballard on the fact that the $175 and $90 rates were the rates that had been awarded to Newberg and Ballard in prior civil rights fee disputes. *See Institutionalized Juveniles v. Secretary of Public Welfare*, 568 F. Supp. 1020, 1034 (E.D. Pa. 1983), *aff'd in part and vacated in part*, 758 F.2d 897 (3d Cir. 1985) (dealing with Newberg); *Kuhn v. Philadelphia Electric Co.*, Civil Action No. 77-1107 (E.D. Pa. Jan. 20, 1982) (fee order) (dealing with both Newberg and Ballard). Relying on these prior cases, the district court found that those fee awards established Newberg's and Ballard's marketplace billing rates for

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2. BGC's counsel also challenges the district court's reduction of the billing rate of Philip Fuoco for the year 1985. Because the hours for which Fuoco was billing in 1985 relate to the fee petition, Fuoco's rate reduction will be discussed in subsection III. 10.

the period of time discussed in those decisions (through 1982 for Ballard and through 1983 for Newberg). Thus the court reduced Newberg's hourly rate for the period of January 1982 to December of 1983 from $200 to $175. Similarly, the court reduced Ballard's hourly rate for the period from October of 1980 to December of 1982 from $115 to $90. Having reduced Newberg's and Ballard's rate from 1980 through 1983, the district court went on to find that there was "insufficient evidence" to support the post-1982 and post-1983 rates claimed by Ballard and Newberg. The court, therefore, reduced both Newberg's and Ballard's claimed billing rates to rates it felt were "fair and reasonable." With regard to Trent, the court found that he was less experienced than Alice Ballard, and consequently the court concluded that $90 per hour was a reasonable rate for all the hours Trent had worked.

The reasonable value of an attorney's time is the price that time normally commands in the marketplace, which is generally reflected in the attorney's normal billing rate. *See In re Fine Paper Antitrust Litigation*, 751 F.2d 562, 590-91 (3d Cir. 1984); *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 167 (3d Cir. 1973) (*Lindy I*). The question of an attorney's marketplace billing rate, therefore, is a factual question which is subject to a clearly erroneous standard of review. *See In re Fine Paper*, 751 F.2d at 591.

The hourly billing rate used in calculating the fees in *Institutionalized Juveniles* and *Kuhn* establish a factual basis for Newberg's and Ballard's marketplace rates. Accordingly, the district court's reduction of Newberg's rates between 1981 and 1983 and the reduction of Ballard's rates between 1980 and 1982 are not clearly erroneous. However there is no factual

support in the record for the reductions after 1982 and 1983. PECO contended that the rates used in *Institutionalized Juveniles* and *Kuhn* represented the maximum rate because inflation slowed in 1984 and 1985. The district court did not accept PECO's argument, but it also did not accept the uncontradicted rates set forth in Newberg's and Ballard's affidavits. Instead, it appears the court felt that because it had reduced the rates for 1980-82 and 1981-83, it should also reduce the claimed rates for 1984-85. The rate reductions for 1984-85 have no support in the record. The historic billing rates set forth in their uncontested affidavits establish marketplace rate. Thus, except for the periods discussed in *Institutionalized Juveniles* and *Kuhn* the district court should have accepted the rates in Newberg's and Ballard's affidavits. Moreover, there was no factual basis for reducing the rates set forth in Trent's affidavit. Attorneys are not fungible. Trent's experience relative to Ballard's experience was not determinative of his billing rate: rather the question is what rate Trent commanded in the marketplace. Ballard's affidavit asserts that the rates she charged for her services in relevant periods are consistent with rates charged by comparable practitioners in the Philadelphia legal community for work of similar nature. The rates sought by Trent are for the most part lower. PECO filed no affidavit and offered no testimony contesting the accuracy of Ballard's statement with respect to charges by comparable practitioners. Thus the uncontradicted affidavits were never put in issue, and the district court was not on this record free to disregard them.

Because the district court erred in reducing undisputed hourly rates we will reverse and direct the district court to recalculate the lodestar using the rates

set forth in the uncontested affidavits. The following chart summarizes the rates to be used:

Newberg

Time	*Rate Claimed*	*Rate Used by District Court*	*Rate to be Used on Remand*
9/75 to 8/78	$135/hr	$135/hr	$135/hr
9/78 to 8/80	$150	$150	$150
9/80 to 12/81	$175	$175	$175
1/82 to 12/83	$200	$175	$175
1/84 to 8/85	$225	$190	$225

Ballard

Time	*Rate Claimed*	*Rate Used by District Court*	*Rate to be Used on Remand*
1/79 to 10/80	$ 90/hr	$ 90/hr	$ 90/hr
10/80 to 12/82	$115	$ 90	$ 90
1/83 to 12/83	$125	$100	$125
1/84 to 7/84	$125	$115	$125
8/84 to 8/85	$150	$125	$150

Trent

Time	*Rate Claimed*	*Rate Used by District Court*	*Rate to be Used on Remand*
1979-80	$100/hr	$ 90/hr	$100/hr
1981-82	$115	$ 90	$115
1983-84	$125	$ 90	$125

2. *Hours Spent on Related Proceedings*

Counsel for BGC also cross-appeals the district court's refusal to include in the lodestar the hours spent in preparing for a National Labor Relations Board (NLRB) proceeding and two temporary restraining orders. The NLRB proceeding involved an unfair labor practice action brought by BGC in which BGC alleged that PECO was giving privileged treatment to another nonmajority employee association while refusing to accord similar treatment to BGC. *See Black Grievance Committee v. NLRB*, 749 F.2d 1072 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 2703 (1985). One of the

temporary restraining orders involved a decision by PECO not to use two independent union hall workers who had disregarded certain orders. The other temporary restraining order attempted to prohibit PECO from changing its practices of sending out collectors in pairs. BGC asserted that the NLRB proceeding provided valuable discovery and that the two temporary restraining orders grew out of situations that illustrated PECO's discriminatory practices. The district court carefully considered BGC's arguments and rejected them.

A prevailing party in a Title VII or section 1981 suit is entitled to recover attorney's fees for the time "reasonably expended on litigation." *Hensley*, 461 U.S. at 433. In protracted litigations the district court must distinguish between those hours that were related to the issues on which the party prevailed and those hours that were expended on unrelated matters. *See Pennsylvania v. Delaware Valley Citizens' Council for Clear Air*, 106 S. Ct. 3088, 3096 (1986) (prevailing party in action under the Clean Air Act could recover attorneys' fees for time spent monitoring the defendant's performance of a consent decree); *see Webb v. Board of Education of Dyer County*, 105 S. Ct. 1923, 1928 (1985) (prevailing party in section 1983 suit could not recover attorney's fees for time spent pursuing administrative proceedings). The classification the district court makes in this respect is subject to an abuse of discretion standard of review. *See Delaware Valley*, 106 S. Ct. at 3096; *Webb*, 105 S. Ct. at 1929.

The NLRB proceeding and the temporary restraining orders were separate matters from the employment discrimination class action. Moreover, neither restraining order was granted. Thus the district court did not abuse its discretion in concluding that these proceedings were not useful or

necessary to secure the settlement of the class action. *See Webb*, 105 S. Ct. at 1929. We will therefore affirm the court's refusal to award fees for the hours spent on these matters.

3. *The "Result-Obtained" Adjustment*

In *Hensley* the Supreme Court held that "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the result obtained." 461 U.S. at 440. While it is clear that a district court must now consider the result-obtained factor, there is no "precise rule or formula" for evaluating the result obtained and the determination is a matter of district court discretion. *Id.* 436-37. In the present case the district court adjusted BGC's lodestar downward by only 25% because BGC was not completely successful in obtaining the relief it sought.

PECO challenges the district court's result-obtained adjustment on two grounds. First, PECO advocates a mechanical comparison of the claims alleged in one of BGC's pretrial memoranda to the relief obtained in the consent decree. This argument only underscores the need for district court discretion in determining the result-obtained adjustment. As PECO itself admits there is an initial problem in determining what to compare. Here this problem is compounded by the fact that the case was settled rather than fully litigated. Even where claims can be compared to results, however, because the claims do not bear a quantitative relationship to the result, the comparison is subjective. For these reasons the *Hensley* Court expressly rejected a mechanical comparison. *See* 461 U.S. at 435 n.11. PECO's first argument concerning the result-obtained factor, therefore, is without merit.

Second, PECO argues that the district court erred in adding a 50% "value to the class" factor to its

result-obtained adjustment. While it is true that the district court seemed to segregate its analysis by first determining the success factor and then adding a value-to-the-class consideration to come up with an overall result-obtained adjustment, the court's determination is not inconsistent with *Hensley*. In *Hensley* the Court emphasized that it was the overall result of the litigation that mattered. 461 U.S. at 435. Because BGC's suit involved a class action the value to the class is certainly an important consideration in measuring the overall success. *Cf. City of Riverside*, 106 S. Ct. at 2694-95 (holding that attorneys' fees do not have to be proportionate to the amount of damages a civil rights plaintiff receives because "a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms.") In addition the settlement provided broad-based relief such as hiring goals, training programs, and department reforms that could result in future class benefits. Thus the district court was not really adding a new factor into the *Hensley* result-obtained adjustment, and because the litigation ended in a settlement that provided broad-based relief, the district court did not abuse its discretion in making only a 25% downward adjustment in the lodestar for the result obtained.

4. *Contingency Adjustment*

In addition to adjusting the lodestar because of the result-obtained factor, the district court also adjusted the lodestar upward by 50% for the contingent risk faced by BGC's counsel in bringing this lawsuit. This adjustment was designed to compensate BGC's attorneys for the risk that they may have recovered no fees because BGC may not have prevailed in its lawsuit. The Supreme Court has yet to decide whether a contingent risk adjustment is proper. *See Delaware Valley*, 106 S. Ct. at 3100; *see also Blum*, 465 U.S. at

901 n.17. This court, however, has held that contingent risk adjustments are permissible. *See Hall v. Borough of Roselle*, 747 F.2d 838, 842-43 (3d Cir. 1984); *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 116-117 (3d Cir. 1976) (*Lindy II*). Nevertheless, to harmonize this holding with the Supreme Court's decision in *Blum*, where the Court held that the mere recital of adjustment factors was insufficient to justify a lodestar adjustment without actual support from the record, this court has placed the burden of proving the necessity for a contingent adjustment on the plaintiff. *See Hall*, 747 F.2d at 843.

BGC's attorneys specifically identified the risks they faced in instituting this litigation. They point out that (1) this case involved a large number of discrete issues, (2) allegations of company-wide racial discrimination are factually and legally difficult to prove, (3) certain legal defense presented open questions of law, and (4) PECO was prepared to provide a strong defense. The district court also pointed out the difficulty BGC faced in demonstrating company-wide racial discrimination through a large number of individual complaints and the risk BGC faced in that the litigation may have proven to be a labor dispute within the exclusive jurisdiction of the National Labor Relations Board rather than a Title VII or section 1981 suit. The district court thus stated that

> the present lawsuit has been as extended, as complex, as expensive and as likely to consume the time of the court, the parties and counsel as any Title VII or other class action ever tried in the United States.

Joint Appendix at 497a. Plaintiffs also knew that they would have to deal with the fact that certain of PECO's most egregious practices had, at least on paper, already

been purportedly remedied by the 1973 Consent Decree in *United States v. Philadelphia Electric Co.*, thereby leaving plaintiffs the task of combatting the more subtle and difficult-to-prove forms of discrimination. In order to meet this challenge, plaintiffs devised a number of novel approaches, *see supra* part 2 ("Hours spent on related proceedings"). This approach to the case development reflects the difficulty of the case. Thus the court's contingent risk findings are not clearly erroneous. Furthermore, the amount of the multiplier is a matter within the district court's discretion and here the court has not abused that discretion.[3] *See Lindy II*, 540 F.2d at 116. *See also Ursic v. Bethlehem Mines*, 719 F.2d 670, 674-75 (3d Cir. 1983).

5. *Double Counting*

PECO argues that the district court considered the success factor twice: once in its evaluation of the relief-obtained adjustment and again in its calculation of the contingent-risk adjustment. Thus PECO asserts that the district court committed a legal error by double counting the success factor. After a careful reading of the district court's opinion, we are unable to say with confidence whether or not the relief obtained played any role in his assessment of the contingency adjustment. On remand, the district court should clarify the rationale underlying its .50 contingency adjustment. If the relief obtained played any role in determining that adjustment, it should be reconsidered without reference to the relief obtained.

6. *Delayed Payment Adjustment*

The final lodestar adjustment the district court

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3. PECO's argument that only the risks faced at the time of the filing can be considered must fail given this court's decision in *In re Fine Paper Antitrust Litigation*, 751 F.2d 562 (3d Cir. 1984).

made was a 25% upward adjustment for the delay in payment. The court justified the size of this adjustment by reasoning that "[n]o counsel fees became potentially payable until the consent decree was approved at which point plaintiff could be named the prevailing party. Indeed, no fees became payable until this court rules on the fee petition." *See Black Grievance Committee v. Philadelphia Electric Co.*, Civil Action No. 75-3156, slip op. at 19 (E.D. Pa. August 13, 1985), *reprinted in* Joint Appendix at 975. BGC challenges the size of the court's delayed-payment adjustment, arguing that the court adopted an unduly narrow view of the remedial purpose of the delayed-payment adjustment.

Several principles affecting our resolution of this issue are already established. First, recognizing that the payment for attorney services rendered in the past deprives an attorney of the time value of money, the Third Circuit has permitted an adjustment for the delay in payment. *See Institutionalized Juveniles*, 758 F.2d at 922. Second, while the district court is not required to award a delay-in-payment adjustment that is equal to the prevailing rate of interest, *id.* at 923, the adjustment should not be limited to the period of time from the fee determination. *See id.* at 923-24. In contrast to a contingent fee arrangement, statutory fees are designed to compensate an attorney as if the plaintiff was a normal fee-paying client. *See* S. Rep. No. 94-1011, 94th Cong., 2d Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5913. The delay-in-payment adjustment, therefore, is designed to compensate the attorney for the time gap between the actual expenditure of services and the fee award. *See In re Fine Paper*, 715 F.2d at 588. The period following the fee determination, on the other hand, is covered by post-judgment interest provided for in section 1961 of title 28 of the United States Code. *See Institution-*

alized Juveniles, 758 F.2d at 927. Although "[t]he decision to award a multiplier for delay in payment and the amount of such a multiplier are determinations within the discretion of the district court," *id.* at 922, the court abused its discretion in this case by not considering the appropriate time period for which the delay-in-payment adjustment is designed to compensate. We will, therefore, remand for a correct analysis.

7. *Order of Lodestar Adjustments*

After determining the various lodestar adjustments, the district court added these adjustments together and multiplied the lodestar by that net adjustment. These adjustments -- a 25% delay enhancer, a 50% contingency enhancer, and a 25% result-obtained reducer -- produced an overall adjustment of 50%, which when multiplied by the lodestar ($283,023.50) yielded an adjusted lodestar of $424,535.25. PECO contends that the district court erred in simply adding the various reducers and enhancers together to obtain a net adjustment.

Neither the Supreme Court nor this court has adopted a specific methodology for applying adjustments to the lodestar. To establish a uniform practice in the Third Circuit, we now hold that a district court should first apply the result-obtained adjustment to the lodestar. Following this adjustment, the court should then add together the other (whether they be reducer or enhancer) adjustments it has found to be justified and multiply that combined factor by the result-obtained-adjusted lodestar. We establish this rule because of the practical desirability of having a uniform methodology. We adopt this particular methodology because the Supreme Court has recently indicated that the result-obtained adjustment is closely related to the lodestar, *see Delaware Valley*, 106 S. Ct. at 3098, and consequently this method is consistent

with current Supreme Court pronouncements on lodestar adjustments, *see id.*; *Blum*, 465 U.S. at 898-901; *Hensley*, 461 U.S. at 436.[4] We, therefore, remand and direct the district court to recalculate the fee award using the lodestar adjustment methodology we have adopted.

8 & 9. *Time Spent in Preparing the Fee Petition*

The district court awarded BGC's attorneys $7,672.50 for the time spent in preparing the fee petition. In calculating this award the court reduced the hourly rate of each attorney to a standard $75.00 per hour and treated these hours outside the civil-rights-litigation lodestar. Both PECO and BGC attack this determination. PECO challenges the award because it fails to take account of BGC's lack of success in obtaining the fee petition award it sought. BGC, on the other hand, argues that the court improperly reduced the hourly rate to a standard $75 per hour.

Like the time spent in litigating the civil rights claim, the time spent in preparing the fee petition is recoverable as a statutorily authorized attorney's fee award. *See Durett v Cohen*, 790 F.2d 360, 363 (3d Cir. 1986); *Prandini v. National Tea Co.*, 585 F.2d 47, 54 (3d Cir. 1978). The fee petition litigation, however, is "a separate entity subject to lodestar and *Hensley* reduction analysis." *Institutionalized Juveniles*, 758 F.2d at 924. Thus, although the district court still has discretion to determine the compensation for the fee litigation, *id.* at 925, that discretion must be exercised in light of the same considerations that affect the lodestar determination. *See Durett*, 790 F.2d at 363.

In the instant fee petition award the district court abused its discretion twice: once in failing to consider

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4. Once the *Hensley* reducer is used, the fee in a partial-success case is the functional equivalent of the final lodestar in a complete-success case.

the petitioning counsel's success in obtaining the full fee award sought, and a second time in reducing the hourly rate to a standard $75 per hour when PECO filed no affidavit contesting the historical rates or the time spent. We will therefore direct the district court to accept the hourly rates set out in the attorneys' uncontested affidavits and remand so that the district court can reconsider the fee award for work on the fee petition in light of the result-obtained factor and any other factor the court finds to be an appropriate consideration.

10. *Expert Witness Fee Expenses*

The final issue that PECO raises in its appeal concerns the district court's award of $13,213.30 in costs for expert witnesses expenses. These expenses were awarded to cover BGC's payments to two industrial psychologists and a certified public accountant. BGC's affidavits state that the industrial psychologists were retained to "review test validation studies previously conducted by PECO . . .[and] each [doctor] would have testified concerning improperly validated tests that were then in use by PECO." Joint Appendix at 914. The affidavits also explain that the accountant was hired to give an "opinion at the settlement approval hearing of the steps necessary for PECO to implement the several provisions requiring changes in personnel policies or establishment of new programs as required by the Consent Decree." *Id.* at 915.

PECO contends that we should remand because the district court failed to articulate the reasons justifying its award of actual expenses, which was greater than the standard witness fee allowed for in section 1821 of title 28 of the United States Code. Section 1821 provides a standard per diem fee for the compensation of witnesses who appear in federal court. 28 U.S.C. § 1821 (1982). This court has held,

however, that a district court has "equitable discretion" to award expert fees beyond those provided for in section 1821 when the expert's testimony is indispensable to the determination of the case. *See Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201, 206 (3d Cir. 1981) (maritime tort action).

In the instant case, the district court failed to make specific findings concerning the indispensability of the experts' testimony to the achievement of the settlement of the employment discrimination class action. We therefore reverse and remand so that the district court can consider the importance of the experts' testimony and make specific findings in light of *Roberts*.

IV.

For the foregoing reasons, we will vacate the district court's fees and costs awards. On remand the district court is directed to recalculate the lodestar using the uncontested billing rates set out in the attorneys' affidavits, while considering any testimony PECO may offer that these rates were unreasonable. In light of this opinion the court will also have to reconsider and/or recalculate the contingency and delay-in-payment adjustment, the order in which the various adjustments are applied to the lodestar, the fee award for work on the fee petition, and the award for experts costs. The district court need not, however, reconsider its decision to reduce the lodestar by 25% because of the result-obtained factor. Nor should the court reconsider its decision to exclude from the lodestar the hours spent by BGC's counsel in preparing for the NLRB proceeding and the two temporary restraining orders.

Each party shall bear its own costs on this appeal, and no fee award shall be considered for work done in connection with this appeal until the district court has

recalculated the fees and costs consistent with this opinion. Once the fees and costs for the underlying settlement and fee dispute are established the parties may submit a fee petition for work done on this appeal to the district court. *Cf. Guido v. Schweiker*, 775 F.2d 107 (3d Cir. 1985).

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for the Third Circuit

Supreme Court, U.S.
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CLERK

No. 86-905

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1986

PHILADELPHIA ELECTRIC COMPANY,

Petitioner

v.

BLACK GRIEVANCE COMMITTEE, et al.,

Respondents

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Where a district court has, in the exercise of its discretion, determined that plaintiffs presented adequate evidence of complexity, contingency, novelty and risk to support a 50% contingency enhancer, and where the Court of Appeals has affirmed the district court's exercise of its discretion, should the Supreme Court take certiorari to assess whether the district court abused its discretion?

2. Should the Supreme Court grant a writ of certiorari in each and every case which raises the question of whether a fee award may ever be enhanced to reflect the contingent aspect of the case pending this Court's resolution of related issues in Commonwealth of Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air?

3. Where, in the exercise of its discretion, the district court found it appropriate to apply a Hensley reducer of 25% and where the Court of Appeals affirmed the district court in such exercise of its discretion, should the Supreme Court grant a writ of certiorari to assess whether the Hensley reducer was correctly determined?

TABLE OF CONTENTS

	Page
Questions Presented	(i)
Table of Contents	(iii)
Table of Authorities	(iv)
Statement of the Case	1
Reasons for Denying the Writ:	
I. THE THIRD CIRCUIT'S AFFIRMANCE OF THE SUFFICIENCY OF THE RECORD TO SUPPORT THE DISTRICT COURT'S DISCRETIONARY DETERMINATION OF THE CONTINGENCY ENHANCER DID NOT CONFLICT WITH THIS COURT'S DECISION IN BLUM v. STENSON	4
II. THE COURT SHOULD NOT GRANT CERTIORARI IN THIS CASE MERELY BECAUSE THIS CASE, LIKE MANY CASES AROUND THE COUNTRY, CONTAINS A RULING REGARDING A "CONTINGENCY" FACTOR	6
III. THE THIRD CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S EXERCISE OF ITS DISCRETION TO APPLY A HENSLEY REDUCER OF 25% DOES NOT CONFLICT WITH THE SUPREME COURT'S DECISION IN HENSLEY v. ECKERHART ..	9
Conclusion	11
Certificate of Service	12

TABLE OF AUTHORITIES

CASES: Page

Black Grievance Committee v. PECo, 615 F. Supp. 1069 (E.D. Pa. 1985) 2

Blum v. Stenson, 465 U.S. 886 (1984) 4

Cf. City of Riverside v. Rivera, 106 S. Ct. 2686 (1986) 10

Commonwealth of Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air, October Term, 1985, No. 85-5 .... (i), 6, 7

Hensley v. Eckerhart, 802 F.2d at 654 .. passim

Illinois Welfare Rights Organization v. Miller, 723 F.2d 564 (7th Cir. 1983) 10

STATEMENT OF THE CASE

This fee litigation arises out of a race discrimination claim filed more than ten years ago, in 1975, by black employees and applicants for employment at the Philadelphia Electric Company ("PECo"). Following substantial discovery, regarding plaintiffs' company-wide claims, and following extensive preparation for trial, a settlement providing for both monetary and injunctive relief was finally reached on the verge of trial in July, 1983. Notice of the settlement was given to the class and the court ultimately approved the settlement in the form of a consent decree signed January 3, 1985.

The Black Grievance Committee ("BGC") filed a fee petition with the district court. Subsequently, on August 13, 1985 the district court ordered PECo to pay plaintiffs' counsel

fees and costs totalling $475,938.18. Black Grievance Committee v. PECo, 615 F. Supp. 1069 (E.D. Pa. 1985).

Upon receipt of the district court's ruling, defendants chose to appeal on a variety of issues. While agreeing to pay to plaintiffs' counsel a little over $100,000 in fees and costs, defendant refused to pay the remainder of the fees, pending appeal. Faced with defendant's appeal, plaintiffs cross-appealed various aspects of the district court's decision to the Court of Appeals.

The Court of Appeals on September 22, 1986, affirmed the district court on certain grounds, found for plaintiffs on certain grounds, found for defendant on certain grounds, and remanded the matter to the district court for further rulings. (802 F.2d 648 (3rd Cir. 1986)). Before the district court had an opportunity to rule on remand, defendant filed the instant

petition for writ of certiorari, challenging the district court's exercise of its discretion in calculating the contingency multiplier and the Hensley reducer.

Plaintiffs oppose the grant of a writ of certiorari in this matter and urge that the writ be denied expeditiously. As set forth below, defendant has failed to demonstrate that any aspect of the Appellant Court's decision warrants the grant of a writ of certiorari. See Sup. Ct. R. 17.

Reasons for Denying the Writ

I. THE THIRD CIRCUIT'S AFFIRMANCE OF THE SUFFICIENCY OF THE RECORD TO SUPPORT THE DISTRICT COURT'S DISCRETIONARY DETERMINATION OF THE CONTINGENCY ENHANCER DID NOT CONFLICT WITH THIS COURT'S DECISION IN BLUM v. STENSON

Just as it argued to the district court and to the Court of Appeals, PECo once again asserts that plaintiffs' counsel failed to present evidence to support a contingency enhancer. Characterizing plaintiffs' counsels' extensive affidavits as mere rhetoric, defendant claims the record was therefore "operatively" equivalent to the totally blank record in Blum v. Stenson, 465 U.S. 886 (1984). (See Petition at 6).

Defendant's argument fails. As the Court of Appeals found, plaintiffs, in counsels' affidavits, specifically identified the legal

and factual complexities of the case. (A36-A38). The arguments set forth by defendant focus on the sufficiency of the record in support of the district court's assessment of the amount of the contingency multiplier. This is a purely discretionary decision addressing the record in this particular case. This exercise of discretion was reviewed and affirmed on appeal.

The district court's discretionary determination that plaintiffs were entitled to a specific contingency multiplier, well within the range of similar awards in countless other fee precedents, certainly does not establish a conflict with this Court's decision in Blum or present an issue of national importance, such that this Court should grant a writ of certiorari pursuant to Rule 17.1(c).

II. THE COURT SHOULD NOT GRANT CERTIORARI IN THIS CASE MERELY BECAUSE THIS CASE, LIKE MANY CASES AROUND THE COUNTRY, CONTAINS A RULING REGARDING A "CONTINGENCY" FACTOR

Defendant argues that because this Court has heard re-argument, in Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air, October Term, 1985, No. 85-5, on "the question whether attorney's fees chargeable to a losing defendant under the Clean Water Act and the comparable statute may be enhanced based on the risk of loss," 52 USLW 5017, 5023 (1986), that this Court should necessarily grant certiorari in the instant case as well, in order "to permit a correct application of the law of contingency enhancers ..." (Petition at page 7).

Defendant's argument proves too much. Were this Court to grant certiorari in each case pending in the Third Circuit or around

the country which raised an issue already being considered by the Court, the Court's docket would quickly become overwhelmed with such cases. Moreover, decisions in cases throughout the country would be substantially delayed pending the outcome in various Supreme Court matters.

Nor is it necessary for the Court to grant certiorari in such cases in order to promote uniformity or consistency. Any decision the Supreme Court reaches in Delaware Valley will, of course, become the law of the land with respect to contingency. The hypothetical new ruling regarding contingency will apply to any case filed after the issuance of such ruling and, if the court chooses to make the ruling retroactive, it will also affect pending cases filed prior to the decision's date. However, just as the issuance of a new ruling will not require a court to re-examine cases decided prior to the decision's issuance,

so too there is no need to take certiorari on all pending cases which raise an issue the Supreme Court may possibly address. Uniformity and consistency are best achieved not by taking certiorari on all such pending cases but, rather, by ensuring that all new decisions are properly applied once they have been issued.

III. THE THIRD CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S EXERCISE OF ITS DISCRETION TO APPLY A HENSLEY REDUCER OF 25% DOES NOT CONFLICT WITH THE SUPREME COURT'S DECISION IN HENSLEY v. ECKERHART

Defendant's second attempt to reverse the district court's Hensley computation on the grounds that it was not based on an "objective" calculation of plaintiffs' degree of success also fails to warrant grant of a writ of certiorari. As the Court of Appeals found, 802 F.2d at 654 (A35-A36), the district court's computation of the Hensley factor fell well within the discretionary zone defined by Hensley. The district court's calculation quite legitimately took into account the overall value to the class of such affirmative action measures as hiring goals, creation of an affirmative action committee, provision of training classes, provision of a career counseling program, and development of a sensitivity training

program for supervisors. (A35-A36; A18-A21). Cf. City of Riverside v. Rivera, 106 S. Ct. 2686 (1986) (vindication of important civil and constitutional rights may be included in assessment of plaintiffs' success). Particularly given the fact that plaintiffs obtained their success in the instant case through settlement, rather than through litigation, it cannot be said that the district court abused its discretion in calculating the Hensley success factor. Illinois Welfare Rights Organization v. Miller, 723 F.2d 564 (7th Cir. 1983). More important, certainly the district court made no misapplication of Hensley which would warrant a grant of certiorari in this matter.

CONCLUSION

Defendant has failed to set forth any consideration warranting grant of a writ of certiorari. The writ should be denied. Defendant has established neither that the Third Circuit's calculation of the contingency or Hensley factors presents an important question of federal law which conflicts with this Court's decisions, nor that this Court must grant certiorari to resolve any conflicts among the Circuits. See Sup. Ct. R. 17.1. Accordingly, plaintiffs respectfully request that this Court deny the writ expeditiously and permit plaintiffs to collect the fees to which they are entitled after more than ten years of litigation.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of this Opposition to Petition for a Writ of Certiorari were served by Hand Delivery upon:

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